UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

LHOIST NORTH AMERICA OF
ALABAMA, LLC, A SUBSIDIARY
OF LHOIST NORTH AMERICA,

And Case 10-CA-221731

UNITED STEELWORKERS,

ANSWERING BRIEF OF THE CHARGING PARTY USW TO RESPONDENT'S EXCEPTIONS TO ALJ'S DECISION

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I. INTRODUCTION.

On June 11, 2018, Respondent Lhoist North America of Alabama discharged Mr. Floyd Avery (the acting Local Union president); an employee with twenty-seven (27) years of service and an excellent work history until Respondent's new management proposed an extensive and whole sale rewrite of a longstanding collective bargaining agreement; a proposed contract that Avery vocally opposed and that Respondent unilaterally implemented on October 30, 2017. The implemented contract contained numerous revisions to well settled language but one section in particular, Section 16.3, was clearly aimed at interfering with the Union's ability to represent bargaining unit members.

It did not take long for the Respondent to impose discipline based on Section 16.3. Avery was disciplined in January 2018 for attending an arbitration because the Union did not comply with the one-week advance notice requirement of Section 16.3. Avery assumed that management would notify his supervisor (as it had done in the past) that he would be attending an arbitration but that did not happen. Rather than treat this as an unexcused absence given that Avery was at an arbitration with Respondent's management, Respondent charged Avery with the more serious violation of a no-call/no-show and threatened discharge unless Avery signed a last chance agreement.

And what did Mr. Avery do to deserve termination a mere six months later? He answered a call during his break from a hearing officer for the Alabama Department of Labor and participated in a telephonic unemployment hearing for discharged co-worker; a hearing that lasted thirty-one minutes (six minutes of which occurred during a break). For most of the call, Avery stood next to a truck that he had just driven around the quarry to water the grounds and keep the

dust down; a task that was not part of his normal job duties as a slurry operator but which Avery volunteered to perform because his slurry operator job did not keep him busy.

The Respondent's human resources manager Stacy Barry was also on the unemployment hearing call. Barry had been the Respondent's lead negotiator during bargaining. Even though Barry knew Avery's work schedule and that Avery was likely at work when he participated on the call, Barry remained silent and did not ask Avery to seek his supervisor's approval to be on the call. For his part, Avery did not think he needed approval because, as the undisputed evidence established, employees at the quarry routinely used their cell phones while at work and the call did not interfere with his job.

A few days later, Avery was approached by the plant manager and asked about the call. The plant manager at first didn't think Avery's participation on the call would result in discipline. However, Avery would soon learn that Mr. Barry and Ms. Berkes (Barry's assistant) would accuse him of falsifying a company record because he participated on the call during work time. They insisted that Avery was on the call as a union representative and that he failed to give notice. Respondent used the overstated and exaggerated accusation of fraud to terminate Avery's employment, even though the charge did not fit the facts and no one at the facility had ever been disciplined (let alone discharged) for falsifying a time record because they were on their cell phone during work time. Indeed, even employees who actually engaged in a fraudulent scheme of falsely reporting truck weights over a period of months and committed multiple acts of false reporting were not discharged for such conduct, including one employee who was on a last chance agreement.

II. STATEMENT OF THE CASE

This case concerns Exceptions filed by Respondent to the Decision issued in this matter on May 20, 2020 by Administrative Law Judge (ALJ) Sharon Steckler. Judge Steckler found that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by 1) suspending and terminating employee Floyd Avery for engaging in protected concerted activity and union activity, and 2) suspending and terminating Avery by the application of a rule which facially and as-applied discriminates against union activity.

Charging Party argues in this brief that Respondent's Exceptions should be dismissed in their entirety. ALJ Steckler issued a carefully reasoned decision, and provided individualized explanations for her evidentiary and credibility determinations based on the record as a whole. The ALJ properly applied the Board's *Wright Line* framework to determine whether Mr. Avery's protected concerted activity was the "motivating factor" in his termination, and finding that it was. *See Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 14 (2018).

Having failed at the hearing to meet its burden to show that the termination of Mr. Avery was even in part based on lawful considerations, Respondent now chooses to levy accusations of judicial bias at Judge Steckler. Respondent offers no support for these accusations, merely citing credibility and evidentiary findings with which it disagrees as its evidence of bias. These claims of bias unfairly malign the Judge's work, and grossly misrepresent her Decision.

Because the Decision correctly found that Respondent violated the Act, the Board should affirm.

III. ISSUES PRESENTED.

The Charging Party USW adopts and incorporates by reference the statement of the issues as found in the Counsel for General Counsel's answering brief.

IV. FACTUAL BACKGROUND.

The ALJ's statement of facts are well grounded in the record and supported by credited testimony and exhibits. The following is brief review of the facts relevant to this brief and the arguments presented:

Mr. Avery worked at the Respondent's Montevallo facility for twenty-seven (27) years before being terminated. (Tr. 24) At the time of his discharge, Mr. Avery was working as a slurry operator. (Tr. 24) He was also the vice president for approximately eight (8) years and acting president of USW Local 563 at the time of his termination. (Tr. 27) The slurry operator mixes hydrated lime with water and loads trucks with the resulting slurry. (Tr. 24-25) The duties of the slurry operator usually takes less than a full day's work. (Tr. 25) Because he had a considerable amount of downtime, Mr. Avery made himself useful by operating the water truck. (Tr. 26) The water truck was used to spray down the premises and keep the dust under control. (Tr. 26) There was no set schedule for running the water truck. (Tr. 70) How often Avery watered down the plant was left to his discretion. (Tr. 70) Though he operated the truck on fairly regular basis, the water truck was not included in his job description but rather it was a task that he performed to help out. (Tr. 48; GEX 3)

Retaliatory Discipline Issued for January 3, 2017 Absence

During his twenty seven (27) years of employment at the Montevallo facility, Avery had two instances of discipline not including the unemployment phone call that resulted in his termination. The first instance involved Avery not reporting to work on Tuesday January 3, 2017. (Tr. 27-28; J. Exh. 3) Avery explained that he had spoken to his supervisor about his return date and was told the date was January 4. (Tr. 28) There may have been some confusion because the New Year's day holiday fell on a weekend and thus the holiday was pushed to the next working day. (Tr. 461-462; G. Exh. 2) When Mr. Avery did not show up to work on January 3rd, his supervisor or someone from the plant called him. (Tr. 459) The plant manager Mr. Gordinier then writes an email explaining that Avery believed (based on a conversation with his supervisor) he was scheduled to return to work on January 4th and most importantly, the email only states that this absence will be treated as one occurrence and that he would not receive pay for the New Year's holiday. (Tr. 462; R Exh. 12) In other words, the plant manager decided to treat this absence as one occurrence and dock of pay but **not** as a "no call/no show". Treating this absence as an unexcused absence makes sense given the circumstances (i.e. confusion about the return date from vacation) and the fact that Avery was not an employee with an attendance problem. (Tr. 461)

It was only later, however, that someone in HR decided to treat this absence as a "no call/no show" and issue a final written warning under the attendance policy (Tr. 463) Though the record is silent on who made this decision, it was more likely than not Mr. Stacey Barry. And why would Mr. Barry or another person in HR decide to escalate the level of discipline, the answer lies in the state of negotiations. Negotiations for a successor agreement stated in October/November 2016. (Tr. 458) According to Ms. Berkes, contract negotiations were contentious because of the Respondent's proposed changes to the contract. (Tr. 458) Berkes also conceded that Avery was

present at the negotiations and was a vocal opponent of some of the changes. (Tr. 458-59) Given other record evidence of Mr. Barry's hostility towards the Union's representation of employee, it is a fair inference that Mr. Avery was issued a final written warning for a "no call/no show" because of this vocal opposition to the Respondent's extensive rewrite of the collective bargaining agreement. Such retaliatory conduct provides further background evidence of animus towards union representatives in the event that *Wright Line* is the appropriate test.[1]

Discipline Issued on January 22, 2018 for Attending an Arbitration Hearing and the Related Last Chance Agreement

The Respondent disciplined Mr. Avery on January 26, 2018 for attending an arbitration hearing on January 22nd regarding a contract grievance. (Tr. 32-33) Mr. Avery testified that he did not notify his supervisor because the past practice had been that the Respondent would notify supervisors when the local union president or vice president attended an arbitration. (Tr. 33:9-25; 34:1-2; 35:21-24)) Unlike the prior absence on January 3, 2017, Avery's supervisor did not call him asking where he was (Tr. 34:5-11) and the Respondent's witness did not deny that this was the past practice prior to the implemented agreement.

Rather than treating this incident as an unexcused absence (given that the Respondent knew where Mr. Avery was on January 22nd and thus had notice of his whereabouts), the Respondent again escalated the discipline issued and threatened to terminate Mr. Avery's employment if he did not sign a last chance agreement. (Tr. 41:1-8) The Respondent's decision to escalate the discipline exhibits animus towards Avery's role as a union representative because (1) even if treated as "no show/no call", termination was not the next step under the Respondent's attendance

[1] This "escalation of discipline" incident fits a pattern of animus towards "union representatives" engaged in representing or assisting bargaining unit members; the same conduct that Avery was engaged in when he participated in the unemployment hearing regarding Mr. Willie May's unemployment benefits.

policy and (2) the implemented Section 16.3 (which was used to issue the discipline) unlawfully discriminated against union activities.

First, as Mr. Barry testified, a "no call/no show" falls under the Respondent's attendance policy. (Tr. 267-268) Rather than a simple occurrence for an absence or tardiness, a "no call/no show" immediately advances the employee to the third step of the discipline policy (i.e. a final written warning). (Tr. 268:1-8) Under the attendance policy, the final written warning does not lead to termination (i.e. the fourth step) as long as the employee does not have "an additional half or one occurrence in the same 12 month period." (R. Exh. 1) Though Barry testified that a "no call/no show" stays on forever, this testimony is contradicted by the express language of the attendance policy which authorizes termination after a final written warning if "an additional half or one occurrence in the same 12 month period" is recorded and/or by the Respondent's General Conduct & Safety rules. These Rules provide as follows:

> The records for disciplinary actions on an employee will be good for a period of one year. If the employee then passes a period of one year without further disciplinary problems, the record will be reduced so that the *employee's next offense would be a written warning.* R, Exh, 7 p. 26 (italics added)

It is undisputed that Mr. Avery did not have an "additional half or one occurrence" or any other disciplinary problem within 12 months of January 3, 2017, the date of his alleged "no call/no show"; the incident that would have led to his termination absent execution of a last chance agreement occurred on January 22, 2018. Had the Respondent been following its own policies and procedures, it should have only issued Mr. Avery a written warning for attending an arbitration hearing on January 22, 2018 without directly notifying his immediate supervisor.

Secondly, Respondent should <u>not</u> have issued any discipline on account of Mr. Avery attending an arbitration hearing in his role as union representative (conduct which is clearly protected union activity). However, the Respondent wanted to make an example of Mr. Avery and

enforce a discriminatory Section 16.3 provision it had unilaterally implemented and then discriminatorily enforced. Before setting out facts related to this claim, it is clear that Mr. Barry testified that Avery was charged with an absence for attending an arbitration on January 22nd because the union had not complied with the implemented Section 16.3 provision. (Tr. 274:4-8)

Section 16.3 in the expired agreement only required the Union to provide one week's notice if a union member or representative planned on attending a "union convention or meeting." [2] (R. Exh. 10 p. 18) The implemented Section 16.3 expanded the list of events that required one week's advance notice from "union conventions or meetings" to "third step grievance meeting(s), arbitration hearing(s) and labor negotiations." (J. Exh. 2, ¶ 9) This additional language was designed solely to impose a greater burden on the Union and expose Union representatives to discipline in the event the Union did not comply with its terms. For example, prior to implementation, the Respondent did not require union representatives to give one week's notice before attending a third step grievance meeting or an arbitration. As Respondent's Production Manager Grant McCallum testified, notice was not required because the union president and vice president always attended grievance arbitrations. (Tr. 35:8-12, 146:10-17, 147:9-13, 275:6-15)

But equally disturbing is that the Respondent does not adhere to this rule when it decides to hold a meeting with the union to discuss/negotiate over a specific employment decision or policy. Both Wilson and Avery testified that after implementation of Section 16.3, they received calls from management to either meet in person or to discuss an employment related matter. (Tr.

[2] The expired agreement (i.e. the 2014 to 2016 agreement) provided in relevant part as follows: "Employees attending **union conventions or meetings** will be allowed leave of absence without pay provided that no more than five (5) total employees are absent at the time and provided one (1) weeks' notice is given to the Company and provided one (1) weeks' notice is given to the Company by the Union in advance of leave."(emphasis added)

49:2-24 (Avery); Tr. 189:10-25; 190:1-25; 191:1-25; 192:1-25 (Wilson)) Such waiving of the requirement when it suits management demonstrates that the purpose of expanding Section 16.3 to include all "labor negotiations" (which includes all interactions and discussions about policies) was simply to burden the Union's ability to represent its members.

Avery's Suspension and Termination for Participating On A Call With An Unemployment Hearing Officer Regarding a Former Employee's Claim for Benefits

On June 1, 2018, while on his morning break, Mr. Avery received a phone call from an unemployment hearing officer. (Tr. 41:9-23; 44:15-23) The call related to a former employee named Willie May who the Respondent had terminated for unsafe operation of equipment. (Tr. 42:16-20) Mr. May also had a grievance pending regarding this termination at the time of the unemployment compensation hearing and the union and Respondent had scheduled a third step for June 7, 2018. (Tr. 58:10-18) Indeed, the purpose of the hearing was to decide whether May engaged in misconduct that would disqualify him from receiving benefits.

The call lasted for 31 minutes. (Tr. 44:15-16; G. Exh. 5) Mr. Stacey Barry participated on the call along with the Respondent's unemployment benefits representative. (Tr. 43: 9-17) When the call came in at 9:21 a.m., Mr. Avery was still on his fifteen (15) minute break which had started that morning at 9:12 a.m. (Tr. 44:21-23) Because there was noise in the breakroom, Mr. Avery walked out the room and headed towards the water truck. (Tr. 45:2-12) He then stood next to his water truck for approximately 25 minutes while on the call with the unemployment hearing officer and Mr. Barry. (Tr. 45:10-12) In other words, Mr. Avery did not take any actions to hide his participation on the call or any action which would indicate an intent to defraud the Respondent. Though Mr. Avery was not certain about his role in the hearing, it's clear that he asked questions about May's training with the front end loaders back up camera and made a statement that employees are not normally terminated for having accidents. (Tr. 43:22-25; 44:1-11)

Four days later, Mr. Avery was questioned about his participation on the unemployment hearing call. (Tr. 50:10-25) Mr. Grant McCallum (Production Plant Manager) asked Avery if he participated on a call with the unemployment office and Avery told him that he received a call while on break and that he didn't inform his supervisor because the call came in while he was on break. (Tr. 51:8-25; 52:1-25) The next day McCallum asked Avery for a short written statement. (Tr. 52:20-23) When he reported to work on June 7th, Mr. Avery provided McCallum with a statement. (Tr. 54:8-13) The statement explained that he answered the call while on his break and that Mr. May had asked the hearing officer to call him. (G. Exh. 4) Avery further stated that he thought he had to participate on the call because Mr. Barry was also on the call for the Respondent and that he had never been involved in an unemployment hearing before. (G. Exh. 4) Later that day, McCallum told Avery that he was being suspended pending further investigation because he was doing Union business on company time. (Tr. 55:12-25) When Avery reiterated why he participated on the call, McCallum stated that "he could see [Avery's] side" of the story. (Tr. 56:1-7)(brackets added)

On June 11, 2018, the Respondent terminated Mr. Avery's employment. (Tr. 64:10-25; 65: 1-15; JX 6) According to the Respondent, Mr. Avery took a call from the unemployment hearing officer and acted on the call as a representative for Mr. Willie May and not as a witness. JX 6)[3] Because the Respondent maintained that he was conducting union business, he was required to provide notice in advance of doing so. (Tr. 476:9-16) During direct examination, Ms. Kelly testified about the contents of the termination letter which she drafted:

Q. Okay. Now the next sentence.

[3] Again, assuming the transcript is admissible, the first page clearly identifies Mr. Avery as a witness and not a representative. (RX 8, cover page)

A. "However, our investigation in a case that you are not sworn in as a witness, did not act as a witness and" -- and "instead acted as a representative for Willie May during the hearing."
Q. Now why did you write that sentence?
A. Again, to say that if he was acting as a representative during the hearing, he should have requested the time off as union business, like he had normally had. (Tr. 476)

Though the termination letter references that Avery had no intention of notifying his supervisor that he had participated in an unemployment telephonic hearing during working hours and claims this as falsely reporting time, the letter clearly finds this conduct objectionable because Avery was thought to have been conducting union business. (J. Exh. 6) Had the Respondent believed he was acting as a witness, Avery would not have been disciplined.

The June 11 termination letter makes many incorrect factual assertions but it also fails to cite a specific policy that Avery violated when he participated on a call conducted by Alabama's unemployment compensation office. Though the letter references "falsely reporting" time because he did not notify a supervisor or clock out but instead received pay while on the unemployment hearing call, the Respondent's time keeping policies don't apply to this situation but rather apply to employees punching their time clock (or a co-worker's time clock) and leaving the premises. Under the General Conduct Rules, employees are required obtain permission from a supervisor and "clock out" whenever leaving the plant during scheduled working hours for any reason except on company business. (R. Exh. 7, p. 4, No. 7) The provision dealing with misrepresentation of information concerns employee applications, medical examination or similar employee personnel records. (RX 7, p. 4 No. 1) The fact that Avery was not required to adjust his time keeping record or notify his supervisor to adjust his time record for simply participating on a call involving "union business" is supported by the numerous instances when he took such calls with the Respondent's knowledge and without being required to change his time keeping record. (Tr. 44:19 – 45:12,

240:17-21, 257:9-11, 258:8-12, 292:8-14, 304:13-17, 305:20-23, 310:7-11, 317:2-16, 338:20 – 339:4, 396:15-20, 439:7-10, 478:18-23, 480:2-4).

During the General Counsel's investigation, the Respondent relied on language in an employee handbook that prohibits "misrepresenting working hours or tampering with the time clock or other Employees' time records are extremely serious offenses." (R. Exh. 5, p. 29; G. Exh. 7, p. 3). First, Mr. Avery testified that the employee handbook was distributed but then rescinded because it contained several provisions that didn't apply to bargaining unit employees. (Tr. 98:12-21) Second, the language preceding this sentence indicates that the concern is "recording entry/exit at the beginning and end of every shift" and that "employees should not clock in more than fifteen (15) minutes prior to their regular starting time or fifteen (15) minutes after their regular ending time" without prior approval. (R. Exh. 5, p. 29). Misrepresenting when you start or end a shift or tampering with a co-worker's time record are the kinds of misconduct this provision is aimed at preventing. The question of whether an employee takes a call while on the clock is simply not addressed by this language. Instead, taking a call while at work is typically addressed through a policy limiting cell phone use.

So what policy restricting cell phone use while on the clock did the Respondent have in place when it terminated Mr. Avery for taking a call from the unemployment compensation office while on the clock? The simple answer is that the Respondent did not have in place a cell phone use policy at the time it terminated Mr. Avery's employment that prohibited Avery from answering the call and staying on the call. The undisputed testimony from both Avery and Mr. Jon Wilson is that there was no policy prohibiting employees from taking calls when not on break. (Tr. 66:11-13; 176:12-13) The only limitation on cell phone use was not taking a call while operating equipment unless it was hands free call. (Tr. 176:4-8; G. Exh. 11 (discipline of Mr. Cameron))

Wilson testified that he has witnessed employees take personal calls while not on break and that he himself has taken a personal call in front of a supervisor without being told to end the call. (Tr. 176:20-25; 182:2-7)

Prior to disciplining Avery, Respondent had never disciplined a bargaining unit employee for taking phone calls during working time. In fact, Mr. McCallum testified that when Respondent observes employees using cell phones in a manner deemed improper, they tell the employee to get off their phone, and that is the end of the matter. (Tr. 388:22 – 390:1). Given this undisputed practice of widespread cell phone use at work, if there was an issue with Mr. Avery participating on the unemployment compensation telephonic hearing, Mr. Barry should have warned Mr. Avery to get permission from his supervisor or hang up. Ambushing Mr. Avery with a termination for allegedly "falsifying" a time record or conducting "union business" while on the clock (take your pick) strongly supports the inference that the termination had little to do with any policy and was motivated by Respondent's animus towards protected activity. Indeed, the Respondent never bothered to dock from Mr. Avery's pay the amount of time he allegedly stole.

Perhaps the most direct evidence of the Respondent's animus towards Union representation of employees can be found in the cell phone policy the Respondent promulgated after it terminated Mr. Avery's employment. First, the Respondent has not produced a "cell phone use" policy dated prior to Mr. Avery's termination and in its July 10, 2018 position statement indicated that there was no cell phone policy applicable to Mr. Avery's situation. (G. Exh. 7, p. 10 No. 9)

Second, on November 20, 2018, the Respondent unilaterally issued a policy memorandum outlining cell phone use and "return from break" policies. (G. Exh. 6) Though the memo states that these are not new policies, the statement is obviously self-serving because the memo doesn't point to any written policy that it is reminding employees to follow. Moreover, the Respondent

had its supervisors review the memo with bargaining unit employees at safety meetings, which supports the inference that there were no policies being enforced regarding cell phone use and "return from break". (Tr. 179:21-25; 180:1-8)

In addition to being an admission that there were no enforced policies regarding cell phone use and "return from breaks" at the time Mr. Avery participated on the June 1's unemployment compensation call, the November 20th memo seethes with animus towards the Union's representation of Mr. Avery. The memo clearly blames the Union for the unilateral issuance of these policies by declaring that the Respondent is responding to the Union's allegation "in support of some recent labor charges" that there is no uniform enforcement of policies prohibiting the use of cell phones during working time and requiring employees to return to work from breaks in a timely manner. (G. Exh. 6) The memo closes by stating that it serves "as the only warning to be received by any and all employees located at our Alabama Lime locations." *Id.*

This is an extraordinary memo for a Respondent to issue if (1) it had policies regarding cell phone use and return from breaks and (2) enforced such policies on a uniform and consistent basis. The fact that the memo was issued **proves** that (1) there were no policies governing these topics and/or (2) employees were not disciplined for using their cell phones during working time and not returning from break in a timely manner. But what really stands out is the explicit message to employees that your Union caused the issuance of this memo and the warning that the Respondent intended to enforce these rules on forward going basis; thus eliminating the privilege of liberal cell phone use and break periods. (G. Exh. 6).

V. ARGUMENT

A. The ALJ correctly applied *Wright Line* in finding that Respondent violated Sections 8(a)(3) and 8(a)(1) of the Act. (Response to Respondent Exceptions #6, 7, 8, 9, 30, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 54, 55, 67, 68, 74, 84, 85, 86. 87, 88, 89, 90, 91)

An employer violates the Act if an employee's protected concerted activity is a "motivating factor" in deciding to discipline her. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 14 (2018). Under the well-established *Wright Line* test, a *prima facie* case is established when: 1) an employee engaged in protected concerted activity; 2) the employer was aware of that activity; and 3) the employer harbors animus towards the activity. 251 NLRB 1083 (1980). Circumstantial evidence, including timing of the discipline, disparate treatment, and pretext, can demonstrate animus. *Kitsap Tenant*, 366 NLRB at slip op. 15. Once a *prima facie* case is established, the burden shifts to the employer to demonstrate that it would have disciplined the employee even in the absence of her protected activity. *Id.*

In *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. (Nov. 22, 2019), the Board clarified the *Wright Line* test: "the General Counsel does not invariably sustain his burden by producing – in addition to evidence of the employee's protected activity and the employer's knowledge thereof – any evidence of the employer's animus or hostility toward union or other protected activity. Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Id. at 11.

Judge Steckler carefully applied the *Wright Line* framework to the facts of this case, using well-established factors to make determinations at every step of the analysis. She found that the General Counsel had "made a strong showing of discriminatory motive [for Avery's termination] with direct and circumstantial evidence," and noted that "[w]hen the General Counsel makes a

strong showing of discriminatory motive, Respondent's rebuttal burden "is substantial." ALJD at 28-29. *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011). Assessing Respondent's proffered justifications for its conduct against the evidence, the judge found them unconvincing and pretextual. ALJD at 29-30.

Respondent now claims that the ALJ "misapplied" *Wright Line*. Respondent offers no explanation that shows a 'misapplication.' Instead, Respondent simply asserts that because Lhoist now claims that Avery violated a rule, the inquiry must end there. Resp. Br. at 18 ("Lhoist's policies require employees to get approval for extended or unscheduled breaks, and they also prohibit misrepresenting time worked. These straightforward facts preclude any fair trier of fact from concluding that Lhoist terminated Avery because he was engaged in protected concerted activity or protected union activity."). It is not the law, however, that an employer may simply assert the existence of workplace policies and thereby evade liability. Rather, the inquiry under *Wright Line* is aimed at ascertaining

The ALJ correctly applied *Wright Line*'s burden-shifting framework, fully addressing Respondent's assertion that it was privileged to fire Avery based on its claim that he violated a policy. She found that Respondent failed to show that "it would have taken the same action for the same reasons, absent the protected conduct." ALJD at 29. Respondent misleadingly cites *Sutter East Bay Hospitals v. N.L.R.B.*, 687 F.3d 424, 435 (D.C. Cir. 2012) for the proposition that it can rebut the General Counsel's *prima facie* case with a mere "reasonable belief" that Avery' conduct violated a rule. *Sutter* addressed a situation where the employer's decisionmakers had a reasonable belief that certain conduct took place, based on factors including the employee's own admissions. The possibility that the facts of the conduct were very different, then, do no necessarily change the analysis of the employer's motivations. In this case, there is no dispute—notwithstanding

Employer witnesses' constantly changing accounting of time-- that Avery participated in a phone call regarding May's compensation. In this case, where the General Counsel admits the conduct and the Employer admits knowledge of the conduct, there is no place for a "reasonable belief" standard.

1. The ALJ did not err in finding that Mr. Avery engaged in protected, concerted activity. (Response to Respondent Exceptions #30, 87)

It is undisputed that the conduct upon which Lhoist based the termination of Mr. Avery was his participation in a telephone hearing conducted by the Alabama Department of Labor in an unemployment compensation case concerning a fellow employee, Willie May. ALJD at 8. The ALJ correctly found that by participating in the state unemployment hearing, Avery engaged in protected activity. ALJD at 21. Under most circumstances, attendance by an employee at a fellow employee's unemployment hearing is protected because it has a "sufficiently close nexus to the terms and conditions of employment." *Supreme Optical Co. v. NLRB*, 628 F.2d 1262, 1263 (6th Cir. 1980).

The Employer here does not seriously argue that Avery's participation in the call does not meet the standard for the Act's protection articulated in the Sixth Circuit's *Supreme Optical* decision. That case held that an employee's participation in an unemployment hearing has a "sufficiently close nexus to the terms and conditions of employment to be protected concerted activity" where "the circumstances of the termination of a particular employee potentially affects the relationship between all employees and their employer," because it is "reasonable for employees to be concerned about the consequences of their possible termination." Here, Avery, as vice-president of his local union, had a reasonable interest in the circumstances of May's termination.

Otherwise protected concerted activity does not 'lose protection' of the Act when an employer asserts that the activity violated a work rule. This odd construction has no place in the *Wright Line* analysis. It is correct that in certain cases, if an employee engages in concerted activity for mutual aid and protection, and the employer is motivated by this activity to take adverse action against her, she may still lose the protections of the Act for "opprobrious conduct." *Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB 1319, 1322 (2006). However, even if Avery violated a work rule, as Lhoist alleges, such conduct does not in any way "cross the line" into a loss of the Act's protection.

The cases cited by Lhoist for the proposition that it is 'not always the case' that attendance at a co-worker's unemployment hearing is protected do not entail any 'loss of protection' of the Act. Instead, these cases apply the traditional standard for identifying activity as protected and concerted—whether the conduct has a "sufficiently close nexus to the terms and conditions of employment." *Supreme Optical Co. v. NLRB*, 628 F.2d 1262, 1263 (6th Cir. 1980). The Board and the courts have repeatedly held that conduct like Avery's is protected and concerted. *See Loyalhanna Health Care Associates*, 332 NLRB 933, 941 (2000); *N.L.R.B. v. Faulkner Hosp*., 691 F.2d 51, 54 (1st Cir. 1982) ("Because the circumstances of another employee's discharge were at issue in the unemployment compensation hearing, we would have no trouble finding that Walsh's aid for purposes of the hearing bore "a sufficiently close nexus to the terms and conditions of employment to be 'protected concerted activity.'"); *Painter Tool*, 235 NLRB 1468, 1472 (1978), enf'd, 601 F.2d 575 (3d. Cir. 1979) (employees were acting for the purpose of mutual aid and protection because the employer's arguably unlawful actions affected all employees, and they were acting "in pursuit of the principle that they not be rendered vulnerable to legal penalties" as a result of misbehavior by the employer.)

The ALJ properly distinguished *Vokas Provision Co. v. NLRB*, 796 F.2d 864 (6th Cir. 1986), which Respondent continues to argue supports its conduct. ALJD at 30-31. In that case, the Court of Appeals for the Sixth Circuit held that "a balance must be struck between the interests of the employee in attending the proceeding and the interests of the employer in maintaining production and discipline over his work force." *Vokas Provision Co. v. N.L.R.B.*, 796 F.2d 864, 876 (6th Cir. 1986). Weighing a series of factors, the court in that case concluded that the balance weighed in favor of the Employer's interest. Notably, the court never concluded that the employees had no interest at all in exercising their rights under the Act, or that attendance at Board hearings is not protected by the Act.

ALJ Steckler applied the balancing test recommended in *Vokas*, and concluded that that case is "differentiated upon its facts." ALJD at 30. She compared the effect of the full day absence of six employees in *Vokas*, with the effect of Avery's participation in a phone call for 25 minutes of his working time on the Employer's interests, and found the Employer's interest here comparatively weaker. She compared the interests under Section 7 of the Act of the employees in *Vokas*, who were not subpoena'd and did not need to participate in the hearing, with Avery's Section 7 interest, noting that he received a direct call from a government agency with a request to participate, and found Avery's interest here comparatively stronger. Additionally, the employees in *Vokas* contravened direct instruction not to leave work to attend the hearing. *Vokas Provision Co. v. N.L.R.B.*, 796 F.2d 864, 865 (6th Cir. 1986). Here, despite participating in the entire course of the call with the knowledge that Avery was on the phone, Lhoist's Stacey Barry never instructed Avery to hang up the phone or to clock out in order to participate in the call. Nor was Avery aware of any prohibition against cell phone use on work time, as the Employer maintained no such rule.

In sum, *Vokas* did not involve a "loss of protection" of the Act. Because the ALJ properly applied the test urged in *Vokas,* and because the facts of that case are substantially different than the facts of this case, Respondent's reliance on that case does not bar a finding that Avery engaged in protected and concerted activity.

2. The ALJ did not err in finding animus in the decision to terminate Mr. Avery's employment. (Response to Respondent Exceptions #6, 7, 8, 9, 35, 36, 37, 38, 40, 41, 42, 43, 44, 54, 55, 74 84, 88)

Respondent argues that the ALJ erred in finding that Respondent had animus towards Avery's participation in an unemployment hearing. The assignment of error lacks merit because the exhibits and record testimony amply support the conclusion that Avery's participation in the unemployment hearing **in the capacity as a "representative"** was a motivating reason in the decision to discipline him for participating on a cell phone call while at work or taking a longer break than allotted. There is little doubt that Respondent believed Avery was acting as a union representative as opposed to just being a witness during the unemployment call; notwithstanding Avery's undisputed testimony that he did not have advance knowledge of the call, was not sure whether he was called as a representative or a witness and believed he had to take the call from a government officer.

(i) Direct evidence of animus

The Respondent cannot dispute that it believed Avery was acting in the capacity of a union representative when he participated in the telephonic unemployment hearing. Avery's termination letter, in relevant part, says as much when it disputes Avery's statement that he was not sure what role he played during the hearing: "You claim that you were not sure if you were called as a witness or representative. However, our investigation indicates that you were not sworn in as a witness,

did not act as a witness and instead acted as a representative for Willie May during the hearing." (J. Exh. 6; Tr. 475-477). When Ms. Berkes was asked during direct examination why she had included this statement about the Respondent's investigation, she testified that "Again, to say that if he was acting as a representative during the hearing, he should have requested the time off as union business, like he normally had." (ALJD p. 13, Tr. 476) The ALJ correctly concluded that the letter and Ms. Berkes's testimony directly establish that Avery's perceived role as union representative during the brief unemployment hearing was a motivating factor in the decision to terminate his employment and that this was further corroborated by Avery's testimony regarding his supervisor's comments that he was suspended because of his union activity. Accordingly, the ALJ correctly found that "[t]hese statements alone are "independently sufficient to demonstrate unlawful discrimination." (ALJD p. 24, ln 5)

The Respondent contends that the ALJ mischaracterized the "direct evidence" testimony because Avery was discharged for doing union business "on company time." (Respondent's Brief, p. 23). The repeated emphasis of the term "on company" time misunderstands the *Wright Line* framework. The Respondent's position that Avery was discharged because he engaged in non-work related activities while on the clock in violation of the policy against "falsifying time records" constitutes their affirmative defense to discharging an employee who the Respondent clearly believed was engaged in representing a former employee during an unemployment hearing. There is no question that Avery's participation in the unemployment hearing call as a representative was for a motive for discharge, even though such activity occurred while "on company time." *See*, *Tschiggriffe Properties Ltd.*, 368 NLRB No. 120 (2019)(finding that warning an employee for talking to co-workers about the union while on the clock was direct evidence that the employee's protected activity motivated the discipline).

Furthermore, contrary to Respondent's position, the termination letter established that it was the perceived representation of Willie May that motivated the discipline. The letter supports this finding because had Avery participated on the call as a witness, he would not have been disciplined for doing so on company time. Berkes testified that it was the perceived representation while on company time that was contrary to the Respondent's policy on conducting union business while on company time. Respondent can call it "falsification of time records" but the label doesn't change the fact that it was the nature of Avery's perceived activities that triggered the discipline or accusation of falsifying time.

(ii) The ALJ correctly found that the circumstantial evidence supported the finding that Respondent's hostility towards Avery's union activities (perceived or otherwise) more likely than not motivated the termination.

The ALJ notes that the direct and undisputed evidence that Respondent disciplined Avery for engaging in protected activity while at work established a *prima facie* showing of animus under *Wright Line*. (ALJD p. 24) Though this evidence was sufficient for purposes of a *prima facie Wright Line* case, the ALJ found that other circumstantial evidence introduced at the hearing also established a *prima facie* case of animus. *Id*. This evidence includes hostility towards unionization, timing of the adverse action, reliance on pretextual reasons and deviations for past practice. *Id*. (citing *Roemer Industries, Inc.*, 367 NLRB No. 133, slip op. at 16 (2019)).

(A) Hostility towards union activity.

The ALJ correctly found that in January 2018, and the Respondent does not dispute, that its managers disciplined Mr. Avery for attending an arbitration hearing in his capacity as acting Local Union president. (ALJD p. 24) Disciplining a union representative for attending an arbitration proceeding that the managers who issued the discipline also attended is frankly beyond

the pale. However, this did not deter Mr. Barry (Respondent's regional human resources manager) from pushing forward to prove a point. Mr. Avery testified without contradiction that he did not notify his supervisor because the past practice had been that the Respondent would notify supervisors when the local union president or vice president attended an arbitration. (Tr. 33:9-25; 34:1-2; 35:21-24))

Rather than treating this incident as an unexcused absence (given that the Respondent knew where Mr. Avery was on January 22, 2018 and thus had notice of his whereabouts) as opposed to a no call/no show the Respondent escalated the discipline issued and threatened to terminate Mr. Avery's employment if he did not sign a last chance agreement. (Tr. 41:1-8) The Respondent's decision to escalate the discipline for Avery's attendance at the January 22 arbitration demonstrated animus towards Avery's role as a union representative because (1) even if treated as "no show/no call", termination was not the next step under the Respondent's attendance policy (a point discussed below with respect to deviation from policies) and (2) the implemented Section 16.3 (which was used to issue the discipline) unlawfully discriminated against **union activities** as the ALJ correctly found. (ALJD p. 32) In other words, the ALJ correctly found that Respondent's discipline of Avery for attending an arbitration hearing in January 2018 was at minimum circumstantial evidence of animus towards Avery's union activity. This evidence coupled with the direct evidence related to Avery's participation in an unemployment call on June 1, 2018 is more than sufficient to meet the *prima facie* showing of animus.

There is other evidence of hostility towards Avery's union activities that the ALJ did not specifically reference but also supports the finding of animus. First, the contract negotiations for a new CBA were very contentious. Mr. Avery participated in these negotiations as the Local

Union's vice president and he was very vocal about his opposition to the Respondent's extensive re-write of the parties long standing CBA. According to Ms. Berkes, contract negotiations were contentious because of the Respondent's proposed changes to the contract. (Tr. 458) Berkes also conceded that Avery was present at the negotiations and was a vocal opponent of some of the changes. (Tr. 458-59)

Second, the contentious negotiations resulted in a unilateral implementation on October 30, 2017. (ALJD p. 4) The Union, including Mr. Avery, filed charges challenging the implementation. *Id*. There was also numerous grievances filed regarding the implementation. The contentious contract negotiations, including disputes about the new Section 16.3, provide "surrounding facts" that support the finding that the Respondent's disciplining of Avery for attending an arbitration and then participating in an unemployment hearing establish Respondent's animus toward Avery's role and activities as a Local Union officer. *See*, *Electrolux Home Products*, 368 NLRB No. 34, slip op., at 4 (2019)(noting that evidence of animosity during the bargaining for a collective bargaining agreement is relevant to deciding the issue of animus). The evidence supports the inference that Mr. Barry and "higher ups" were hostile towards Avery's protected activity and sought through Section 16.3 and unlawful discipline to discourage Avery's activities on behalf of the Union and bargaining unit members.

Finally, Barry's issuance of a "cell phone and break time" memo threatens strict enforcement of new policies because Avery and the Union filed a charge challenging his termination. On November 20, 2018, the Respondent unilaterally issued a policy memorandum outlining cell phone use and "return from break" policies. (GCX 6) Though the memo states that these are not new policies, the statement is obviously self-serving because the memo doesn't point to any written policy that it is reminding employees to follow. Moreover, the Respondent had its

supervisors review the memo with bargaining unit employees at safety meetings, which supports the inference that there were no policies being enforced regarding cell phone use and "return from break". (Tr. 179:21-25; 180:1-8)

In addition to being an admission that there were no enforced policies regarding cell phone use and "return from breaks" at the time Mr. Avery participated on the June 1's unemployment compensation call, the November 20th memo seethes with animus towards the union activities. The memo lames the Union for the unilateral issuance of these policies by declaring that the Respondent is responding to the Union's allegation "in support of some recent labor charges" that there is no uniform enforcement of policies prohibiting the use of cell phones during working time and requiring employees to return to work from breaks in a timely manner. (GCX 6) The memo closes by stating that it serves "**as the only warning to be received by any and all employees located at our Alabama Lime locations**." *Id*.

(B) The Respondent concedes the lack of documentation, the failure to question Avery's immediate supervisors and the failure to check the call's transcript prior to disciplining Avery; all facts that support the ALJ's conclusion that Respondent's truncated investigation supports an inference of animus.

The ALJ correctly observed that a truncated investigation provides evidence of unlawful animus. (ALJD p. 25) As the ALJ notes, Avery's participation in a telephonic unemployment hearing was the "springboard for the remainder of its actions." *Id*. The Respondent concedes that it did not document its investigation, take notes of interviews or request the unemployment hearing transcript before disciplining Avery. (Respondent's Brief, p. 28) It further concedes that it did not interview Avery's immediate supervisors about enforcement of break time or use of cell phones while on the clock. *Id*. Of course, all these undisputed factual findings support the conclusion that Respondent's investigation was truncated and questionable.

The Respondent simply argues that these facts are immaterial because Avery admitted his misconduct. First, Avery did not admit misconduct. He admitted that he participated on a call he received from the unemployment hearing officer, that the call started while he was on break and ran for an additional 25 minutes, that he left the breakroom and walked towards the water truck and that he was aware Mr. Barry was on the call, which is why he participated. However, Avery adamantly denied that he violated any work rule and denied that he falsified a time record. (Tr. 113) Indeed, the Respondent, as evidenced by the November 20, 2018 memo, knew that it had no policy regarding use of a cell phone while at work and did not enforce its policy regarding excessive break. (Tr. 180-181). s*ee, Flagstaff Medical Center*, 357 NLRB 659, 665 (2011)(noting that employer's decision to enforce a policy that it had not previously enforced support an inference of unlawful motivation); *see also, Health Management Inc*., 326 NLRB 801, 806 (1998)(observing that disciplining a union activist on the basis of an unwritten rule that no one else had ever been disciplined for violating supports an inference of animus). The Respondent instead "shoe horned" these facts (which at best involved a use of a cell phone while at work and taking an extended break) into an accusation of falsifying a time record.

Second, Respondent asks the question "what more need it do" by way of an investigation. (Respondent's Brief, p. 28) The ALJ's opinion answers this question. The failure to request the transcript prior to disciplining Avery was material because it would have supported Avery's claim about how and when he got roped into participating in the telephonic unemployment compensation hearing.[4] But the Respondent didn't wait because Mr. Barry was clearly upset that Avery was on

[4] The Respondent argues that the Union could have called May to corroborate Avery's testimony that he was not aware in advance that he would be called on June 1, 2018. Of course, Mr. May is a former bargaining unit member and not under the control of the Union. Thus, the case Respondent cites is inapplicable.

the call apparently in the capacity as May's representative. The failure to interview supervisors and other employees regarding cell phone use and break usage at the quarry is also material. Had the Respondent conducted such interviews, it would have learned that at the Montevallo quarry, it was common for employees to take extra breaks (especially in the summer) and not unusual for them to use their cell phones while at work. (Tr. 184) More importantly, supervisors did not discipline employees for such activities and did not enforce any policies the Respondent may have had regarding cell phone use and excessive breaks.

(B) The ALJ properly found that Lhoist gave shifting explanations.

The ALJ found that Respondent shifted its explanation on several material matters. (ALJD p. 26) It is well settled that where a defense is shifting and inconsistent, this is strong support for a finding that no legitimate reason existed for the adverse employment action. *See, Frances House, Inc*., 322 NLRB 516, 523 (1996). Respondent argues that the ALJ did not fully and fairly consider evidence in the record that shows Respondent's basis for termination was consistent. But in articulating this assignment of error, the Respondent demonstrates exactly why the ALJ's characterization of its defense as shifting and inconsistent fits the bill. The Respondent can't decide which policy Avery actually violated and why it justified termination.

(1) Length of the Call.

The ALJ found that Respondent gave conflicting accounts of how long Avery was on the unemployment hearing call. The ALJ correctly noted that Respondent argued that Avery was the unemployment hearing call for 37 minutes. It later argued he was on the call for 30 minutes. Finally, McCallum testified that Avery was terminated for being on a call for 31 minutes of company time. (ALJD p. 26). The Respondent does not dispute that it gave varying accounts of how much company time Avery spent on the unemployment hearing call. Instead, Respondent

contends that the amount of time is immaterial to the decision to terminate. (Respondent's Brief, p. 33).

But the reason it provides for why the amount of time is immaterial actually demonstrates the shifting nature of Respondent's explanation, or better yet, shows that it manipulated the common work place issues of using a cell phone on work time or an employee taking too long of break into a claim of fraud and falsification of records. In response to the ALJ's finding that Respondent gave different amounts of time, it argues that "either way, Avery exceeded his break time by either 37 minutes or 25 minutes." (Respondent's Brief, p. 33)

Respondent then further claims that extending a break is considered falsification of timekeeping. However, the policy Respondent used to discipline Avery does not apply to the extended break time scenario, a scenario which does not even capture what actually happened. Respondent relied on language in an employee handbook that prohibits "misrepresenting working hours or tampering with the time clock or other Employees' time records are extremely serious offenses." (RX 5, p. 29; GCX 7, p. 3) First, Mr. Avery testified that the employee handbook was distributed but then rescinded because it contained several provisions that didn't apply to bargaining unit employees. (Tr. 98:12-21) Second, the language preceding this sentence indicates that the concern is "recording entry/exit at the beginning and end of every shift" and that "employees should not clock in more than fifteen (15) minutes prior to their regular starting time or fifteen (15) minutes after their regular ending time" without prior approval. (RX 5, p. 29) Misrepresenting when you start or end a shift or tampering with a co-worker's time record are the kinds of misconduct this provision is aimed at preventing.

Finally, and perhaps most persuasively, given the conditions of working at a quarry and the nature of the work, employees were allowed to take breaks as needed without clocking out.

(Tr. 184-185) Wilson testified that employees could take breaks as long as they got the job done and that the prior supervisor approval was not required. *Id*. Wilson's testimony directly contradicts Berkes's statement that taking a break without supervisor approval constitutes falsification of a time record. Indeed, the employer was unable to identify a single employee disciplined for taking "too long for breaks." (ALJD p. 16; Tr. 397-398)

The question of whether an employee takes a call while on the clock is simply not addressed by the Respondent's time keeping and falsification policy. Instead, taking a call while at work is typically addressed through a policy limiting cell phone use. And this is precisely the conduct at issue and not falsification. It is undisputed that Avery ended his break and walked over to the water truck while still on the unemployment hearing call. Because Respondent lacked a cell phone use policy that prohibited being on your cell phone while at work, it decided to accuse Avery of falsifying his time card. The point is that the ALJ correctly determined that Respondent gave shifting and inconsistent explanations for why Avery's participation in the unemployment hearing merited termination.

(2) The ALJ correctly noted the Respondent's inconsistent and evasive responses regarding the existence of a cell phone policy.

Respondent contends that it did not have a cell phone policy and did not rely on a cell phone policy to discipline Avery for participating in a telephonic unemployment hearing while at work. The ALJ correctly noted that the position that there was no cell phone policy conflicted with the Respondent's November 20 "cell phone and returning from breaks timely" memo issued in response to Avery's "unfair labor practice charges" that "reminded" employees that it's against policy to use a cell phone for personal calls while on the clock and also that it's against policy to take breaks in excess of the allotted 15 minutes. (ALJD p. 14; GC Exh. 6; Tr. 180-181) Barry's testimony on why he issued this "refresher" memo shows (1) that there was no consistent practice

regarding cell phone use and the duration of breaks and (2) his animosity towards union activities.

Significantly, the memo's discussion of returning from breaks does not claim that failure to do so constitutes "falsification of time records." The memo demonstrates that Avery was correct when he testified that he did not think he was violating a policy when he participated on the unemployment hearing phone call. The Respondent's decision to over-charge him with "falsification of a time record" further reflects that Barry and "higher ups" were determined to rid themselves of Avery because of his persistent union activities, even if it required making up a policy violation.

(3) Avery's January 2018 discipline was inconsistent with its written policy.

The ALJ correctly found that the reasons given for threatening to terminate Avery in January 2018 for attending an arbitration was inconsistent with the Respondent's own policies. (ALJD p. 26) In January 2018, Avery showed up at an arbitration hearing in his capacity as a Local Union representative. Mr. Barry and Ms. Berkes also attended the January 2018 arbitration. (Tr. 32-33) Under past practice, Avery testified that management would notify his supervisor about the arbitration and that Avery would be attending the arbitration. (Tr. 40) Even though the Respondent was aware of Avery's location and had knowledge of the prior practice of notifying managers that an arbitration was scheduled, the Respondent took no steps to inform Avery that he needed to notify his supervisor of his whereabouts. Instead, the Respondent applied the recently implemented Section 16.3 to threaten Avery with termination if he did not sign a last chance agreement. (Tr. 40-41)

The threat of discharge, however, was inconsistent with Respondent attendance policy. Rather than a simple occurrence for an absence or tardiness, a "no call/no show" immediately advances the employee to the third step of the discipline policy (i.e. a final written warning). (Tr.

268:1-8) Under the attendance policy, the final written warning does not lead to termination (i.e. the fourth step) as long as the employee does not have "an additional half or one occurrence in the same 12 month period." (R. Exh. 1) Though Barry testified that a "no call/no show" stays on forever, this testimony is contradicted by the express language of the attendance policy which authorizes termination after a final written warning if "an additional half or one occurrence in the same 12 month period" is recorded and/or by the Respondent's General Conduct & Safety rules. These Rules provide as follows:

> The records for disciplinary actions on an employee will be good for a period of one year. If the employee then passes a period of one year without further disciplinary problems, the record will be reduced so that the *employee's next offense would be a written warning.* R. Exh. 7 p. 26 (italics added)

It is undisputed that Mr. Avery did not have an "additional half or one occurrence" or any other disciplinary problem within 12 months of January 3, 2017, the date of his alleged "no call/no show", the incident that would have led to his termination absent execution of a last chance agreement occurred on January 22, 2018. (ALJD 26) Had the Respondent been following its own policies and procedures, it should have only issued Mr. Avery a written warning for attending an arbitration hearing on January 22, 2018 without directly notifying his immediate supervisor.

However, the Respondent wanted to make an example of Mr. Avery and enforce a discriminatory Section 16.3 provision it had unilaterally implemented and then discriminatorily enforced. Mr. Barry testified that Avery was charged with an absence for attending an arbitration on January 22nd because the union had not complied with the implemented Section 16.3 provision. (Tr. 274:4-8) Section 16.3 in the expired agreement only required the Union to provide one week's notice if a union member or representative planned on attending a "union convention or

meeting." [5] (R. Exh. 10 p. 18) The implemented Section 16.3 expanded the list of events that required one week's advance notice from "union conventions or meetings" to "third step grievance meeting(s), arbitration hearing(s) and labor negotiations." (J. Ehx. 2, ¶ 9) This additional language was designed solely to impose a greater burden on the Union and expose Union representatives to discipline in the event the Union did not comply with its terms. For example, prior to implementation, the Respondent did not require union representatives to give one week's notice before attending a third step grievance meeting or an arbitration. As Respondent's Production Manager Grant McCallum testified, notice was not required because the union president and vice president always attended grievance arbitrations. (Tr. 35:8-12, 146:10-17, 147:9-13, 275:6-15)

The ALJ correctly concluded that the Respondent's unexplained departure from the language of its own attendance policy when it disciplined Avery for attending an arbitration hearing as that Local Union vice president was evidence of inconsistent conduct that supported a finding of animus towards Avery's union activities. But this inference is further strengthened because it repeats itself when Avery participated in the telephonic unemployment compensation hearing. Again consistent with past practice and shop norms, Avery participated on the call while at work because the Respondent did not have an enforced policy prohibiting his participation. It was common at this location for employees to take cell phone calls while at work without having

[5] The expired agreement (i.e. the 2014 to 2016 agreement) provided in relevant part as follows: "Employees attending **union conventions or meetings** will be allowed leave of absence without pay provided that no more than five (5) total employees are absent at the time and provided one (1) weeks' notice is given to the Company and provided one (1) weeks' notice is given to the Company by the Union in advance of leave."(emphasis added)

to later adjust their time card and indeed, it happened repeatedly when Avery and representatives of management would talk on the phone while he was at work regarding union business.[6]

However, because Mr. Barry objected to Avery's participation on the call and had knowledge of Avery's last chance agreement, he initiated an investigation with the purpose of terminating Mr. Avery. The Respondent disregarded the past practice and the actual language of the time keeping policy. The Respondent shoe-horned the alleged misconduct into a violation that no reasonable person would conclude fits the facts.

(C) The timing of Avery's discipline supports an inference of animus.

The Board has long held that a close timing between an employee's protected activity and an employer's adverse action is indicative of employer animus toward the protected activity. *Lucky Cab Co.*, 360 NLRB 271, 274 (2014); *ManorCare Health Services-Easton*, 356 NLRB 202, 225 (2010). The ALJ correctly found that the "timing here is undeniable: Respondent started the investigation into Avery's conduct based upon his attendance in the unemployment hearing, believing he was engaged in union activity and knowing he was representing an employee." (ALD Dec. p. 27) Of particular significance is that Barry did not ask whether Avery was at work and/or had notified his supervisor.

Respondent, citing *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672 (2004), contends that timing is irrelevant because of the close temporal proximity between the protected activity, blatant misconduct and the resulting termination. However, in *Syracuse Scenery*, the

[6] The fact that Avery was not required to adjust his time keeping record or notify his supervisor to adjust his time record for simply participating on a call involving "union business" is supported by the numerous instances when he took such calls with the Respondent's knowledge and without being required to change his time keeping record. (Tr. 44:19 – 45:12, 240:17-21, 257:9-11, 258:8-12, 292:8-14, 304:13-17, 305:20-23, 310:7-11, 317:2-16, 338:20 – 339:4, 396:15-20, 439:7-10, 478:18-23, 480:2-4).

"blatant misconduct" was that the employees in question left work early without permission on four consecutive days, submitted fraudulent timesheets to secure payment for hours not actually worked, and then lied about the misconduct when confronted. *Id*. at 672. Moreover, the Board noted that the employer had repeatedly stressed to the discharged employees that they must submit accurate timesheets and had done so one week prior to the events that resulted in termination. *Id*.

Unlike the employees discharged in *Syracuse Scenery*, Avery did not (1) leave work early not submit a fraudulent timesheet, (3) did not violate any policy regarding break time or using a cell phone while at work because such policies did not exist or were not enforced, (4) did not hide his participation on the call from the Respondent and (5) did not lie about his conduct and even agreed to have the twenty-five (25) minutes deducted from his pay.

Avery's candor about his conduct and the lack of an intent to deceive about participation on an unemployment call that did not directly benefit him makes the timing of the falsification accusation suspect. In *United Parcel Service of Ohio*, 321 NLRB 300, 323 (1996) the lack of any intent to deceive was given great weight by the Board in finding that employee's activity was protected.

Finally, contrary to Respondent's argument, Mr. Barry did have an obligation to inquire in timely manner once he learned that Avery was on the call. Barry was familiar with Avery's schedule, which was an 8 hour shift five days per week. (Tr. 348) The Respondent cannot simply "lie in wait" for a pro-union employee to engage in some conduct that it will then use to terminate such employee. *See*, *Smith Auto Service*, 256, NLRB 610, 613 (1980) In such circumstances, the Respondent's "lying in wait" conduct supports an inference of animus because the Respondent would not normally behave in such fashion absent its hostility to an employee's protected activity. Barry could have easily asked whether Avery was at work early into the call if he was concerned

that Avery's participation during work hours violated Respondent's policy. (Tr. 347: Barry knew "two or three minutes" into the call the Avery was on the call.

(D) The ALJ correctly found that Respondent subjected Avery to disparate treatment.

The ALJ conclude that the evidence showed Respondent disparately applied it policies when it disciplined Avery and that such conduct supported the inference of animus. (ALJD pp. 27-28). Specifically, the ALJ found that Respondent treated Avery differently with respect to its cell phone use policies or guideline and for allegedly falsifying a company record. The Respondent argues that Avery's use of a cell phone while on the clock was never an issue and that it had good reasons for not terminating an employee accused of falsifying a company record who was, like Avery, on a last chance agreement. The Respondent's arguments lack merit.

(1) Respondent's mischaracterization of Avery's conduct as falsification of a time record as opposed to the actual conduct of cell phone use during work time supports a finding of disparate treatment and pretext.

The ALJ correctly found and, the Respondent does not dispute in its brief, that Respondent returned a temporary employee after "multiple offenses" of cell phone use during work time, including surfing the web. (ALJD p. 27) Nor does Respondent dispute that Avery using his cell phone to participate on the unemployment call during work time was the first and only time Respondent became aware of Avery improperly using his cell phone during work time. *Id*. So based on these two undisputed facts, the ALJ correctly concluded that Respondent disparately applied its cell phone use policy or practices and that such disparate treatment supports an inference of animus towards the activity Avery was engaged in, namely, participating in an unemployment hearing on behalf of a terminated bargaining unit member.

Respondent argues that Avery's use of a cell phone while on working hours was an "irrelevant fact and nothing but a red herring." (Respondent's Brief, p. 36) Respondent further

claims that Avery's use of a cell phone was never an issue until the Union, grasping at straws, made it one. *Id*. Far from grasping at straws, the fact that Respondent transformed the use of a cell phone while on work time (an activity the Respondent did not prohibit under most circumstances and only disciplined after "multiple offenses") into the serious "falsification of a company record" accusation demonstrates its animus against Avery's protected activities. One need only ask why the Respondent did not accuse the temporary employee who used his cell phone during work time of falsifying a time record to see the disparate treatment.

The Respondent's mischaracterization and exaggeration of Avery's participation on a telephonic unemployment hearing supports the inference of animus against Avery's protected activity. It's not the fact that he was on his cell phone while at work that bothered Mr. Barry, it's the fact that he was on the call as May's representative and/or witness. In *Weldon, Williams & Lick*, 348 NLRB 822, 826 (2006), the Respondent terminated an employee named Morfey who had engaged in union activity on the grounds that he committed the serious offenses of committing an act of workplace violence. *Id*. The evidence, however, showed that the Respondent had mischaracterized and exaggerated the Morfey's actions. The Board noted that "the Respondent has significantly overstated the seriousness of Morfey's conduct, calling it "violent" and asserting that he damaged the door to Houston's office. There is no evidence of violence, however, and the damage to the door was no more than a slight dent." *Id*. Because the Respondent overstated and exaggerated Morfey's actions, the Board agreed with the ALJ that this showed the reasons given for Morfey's discharge were pretextual.

The Respondent's decision to charge Avery with falsifying a company record as opposed to simply viewing his conduct as involving the use of a cell phone during work time overstates the seriousness of Avery's participation in the telephonic unemployment hearing. As noted in the

ALJ's decision and as the record evidence established, the Respondent does not discipline (let alone terminate) employees for using their cell phones during work time. Mr. Avery was at work when he participated in the telephonic unemployment compensation hearing and there is no evidence that his participation on the call interfered with his duties. Indeed, he testified without contradiction that had a truck arrived at the site, he would have attended the truck. Thus, during the unemployment hearing call, Avery was not relieved of all duties. The evidence clearly showed that the nature of Avery's slurry operator job involved a considerable amount of downtime; downtime that still constitutes compensable work time.[7] The Respondent's decision to mischaracterize the facts and events occurring on June 1, 2018 to fit its accusation that Avery falsified a time record shows that another motive was at work. *See, El Farra Enterprises, Inc.*, 295 NLRB 905, 909 (1989)(Respondent's mischaracterization of factual events (i.e. mischaracterizing facts as an employee quitting instead of being terminated) strongly supports the conclusion that that termination was motivated by some other reason); *see also, Calvin D. Johnson Nursing Home*, 261 NLRB 289, 293 (1982)(finding that Respondent choice "to characterize the Charging Parties' conduct as unwarranted 'desertion' and to apply discharge as the penalty, even though its own personnel guide book otherwise has a provision "leaving without permission" with a written warning listed as the penalty for a first offense" to be a "pretextual mischaracterization" of

[7] The Fair Labor Standards Act makes clear that an employee engaged to perform a job at the employer's premises and remains on such premises at the direction of the employer must be compensated for all hours so engaged even if the job assignment entails a substantial amount of downtime. The employer need not pay an employee only if he or she is relieved of all duties for a substantial period of time and allowed to leave the premises. *See, Cole v. Farm Fresh Poultry*, 824 F. 2d 923 (11th Cir., 1987). Thus if the Respondent is legally obligated to pay Avery for the time he spent at the quarry even if his job did not require constant activity, the accusation of theft of time is baseless.

Charging Parties' activities that justified the inference that Respondent's actions were motivated by animus directed at the Charging Parties' concerted conduct.)

(2) The ALJ correctly found that Respondent subjected Avery to disparate treatment because it did not terminate an employee on a last chance agreement when it found that such employee falsified a company record.

The ALJ found that Respondent did not terminate a several employees even though it was undisputed that these employees falsified company records. (ALJD p. 28) The ALJ further found that the falsification of truck weights violated the Respondent's code of conduct AND state and federal reporting requirements. *Id*. Yet, the Respondent gave lesser discipline for conduct unlawful under state and/or federal statutes. *Id.* Because these offenses violated both Respondent's rule against falsifying company documents and were unlawful, the ALJ correctly determined that this conduct was more grievous than Avery's alleged misconduct. *Id.* States and the federal government regulate truck weights because, among other things, an overloaded truck presents a safety hazard to other drivers on public roads and highways and imposes burdens on infrastructure the country depends upon.[8] Finally, the ALJ found that Respondent did not terminate employees for falsifying records. *Id*. Mr. Avery is the only instance of an employee being discharged for allegedly falsifying a company record.

Not only did the Respondent not terminate employees engaged in such a serious falsification of company records, it did not terminate an employee named Albert Thomas who was on a last chance agreement for poor production and other problems. (ALJD p. 28) Without giving

[8] Congress included within its declaration of policy that among the foremost needs that the surface transportation system must meet to provide for a strong and vigorous national economy are **safe, efficient, and reliable**—(i) national and interregional personal mobility (including personal mobility in rural and urban areas) and reduced congestion; (ii) flow of interstate and international commerce and freight transportation; and (iii) travel movements essential for national security. 23 U.S.C. § 101 (emphasis added)

much explanation, the Respondent argues that the circumstances surrounding Avery's third violation "for attendance" and alleged falsification of a time record on June 1, 2018 is not comparable to the falsification of company documentation at the direction of a supervisor. (Respondent's Brief, p. 39) Indeed, the supervisor directed fraudulent scheme was much worse, exposing the Respondent to civil and/or criminal liability; yet no one was terminated for violating a policy that Respondent says can result in termination on the spot. (Tr. 325)

Moreover, the Respondent does not dispute the ALJ's conclusion that Mr. Thomas's violation was more serious than Avery's alleged misconduct. Avery alleged misconduct involved only one incident. Mr. Thomas and others were involved in fraudulent scheme that involved numerous instances of falsification. The finding that Thomas's conduct was much more serious supports the ALJ's conclusion of disparate treatment. Additional considerations further buttress this conclusion: (1) Avery was on the same last chance agreement as Thomas (Tr. 246); (2) the same supervisors and managers made the decisions in both cases (Tr. 246); (3) Avery worked in the same unit as Thomas; (4) was subject to the same work rules as Thomas and (5) was accused of violating the same work rule that Thomas was accused of violating. (GC Exh. 10). Thus, contrary to the Respondent's argument, its treatment of Thomas is relevant to the determination of Avery's disparate treatment.

Finally, Respondent's efforts to distinguish the Thomas case from Avery's only highlights its shifting and inconsistent explanations. First, it claims that Thomas was not terminated in part because he had filed EEOC charges. This explanation conflicts with the position that supervisors were in some unspecified degree responsible for the falsification and doesn't explain why several other individuals involved in this fraudulent scheme involving multiple instances of falsification weren't terminated.

Second, Respondent describes Avery's conduct of taking a call during work time as the third violation for attendance in less than three years in addition to the alleged falsification of a time record. (Respondent Brief, p. 39) This is a stunning admission and reversal of position. The Respondent insisted that the only policy at issue was the policy prohibiting falsification of a company record and that Avery alleged violation of this policy was the reason for his termination. Yet, when confronted with the fact that Mr. Thomas (who was on an LCA) was not terminated for an admitted violation of this same rule, the Respondent throws in an alleged attendance policy violation in an effort to distinguish Avery's situation from Thomas's. Rather than distinguishing Avery from Thomas, the claim that Avery also violated the attendance policy when he participated in the telephonic unemployment hearing solidifies that ALJ's finding that Respondent has shifted its explanations for why it disciplined Avery.

(3) The ALJ did not err in finding that Respondent applied Section 16.3 in an overly broad fashion.

Respondent contends that the ALJ deliberately misconstrued the purpose of Section 16.3 and that she erred in finding that the Respondent applied the Section's notice requirement to Avery's participation in the telephonic unemployment hearing. (Respondent's Brief, p. 40) The ALJ correctly noted that the Respondent argued in its post hearing brief that Avery had advance notice of the unemployment hearing and that he didn't comply with Section 16.3's advance notice requirement. (ALJD p. 32) The ALJ concluded that the Respondent believed that Avery was engaged in union business and that its applied Section 16.3 notice requirement to his participation in the unemployment hearing. (ALJD p. 32) However, the plain terms of Section 16.3 do not apply to a union officer's participation in a bargaining unit member's unemployment compensation hearing. *Id*. Thus, disciplining Avery for participating on the unemployment hearing call without giving the Section 16.3 advance notice violated Section 8(1)(1) because the overbroad application

of this provision interfered with Avery's protected activity (i.e. his right to participate in a co-worker's unemployment compensation hearing).

The Respondent's brief makes several disjointed and factually incorrect arguments regarding the ALJ's finding.[9] First, Respondent argues that Section 16.3 is an advance notice requirement for taking union leave and not a "rule" or basis for discipline. (Respondent's Brief, p. 39). This claim is wrong and contradicted by the discipline Avery received in January 2018 for attending an arbitration without complying with Section 16.3. (ALJD p. 7) Indeed, Mr. Barry read to Avery the terms of Section 16.3 when he issued the discipline. *Id*.

Second, the Respondent next argues that the ALJ missed the point about Section 16.3 and that the only reason Respondent mentioned the notice requirement in Section 16.3 was just in case Avery claimed he was engaged in union business when he participated in the unemployment hearing. (Respondent's Brief p. 40). The "just in case" defense is contradicted by the repeated references in the June 11, 2018 termination letter that Avery failed to give the required notice. (J Exh. 6) Indeed, the termination letter references Avery's January 22, 2018 discipline, which as noted above involved a failure to comply with the implemented Section 16.3. (J Exh. 6) The "just in case" defense also makes little sense in light of Avery's testimony during the Respondent's investigation that he did not know in advance that the hearing had been scheduled for June 1, 2018. (ALJD p. 10)

So why refer to Section 16.3 when Avery says he didn't know about the unemployment hearing in advance and thus could not have possibly complied with the rule? The reason is that

[9] In footnote 29, the Respondent argues that the implemented Section 16.3 remained in the current collective bargaining agreement agreed to in 2019. First, the ALJ correctly noted when it was applied in 2018, the Union opposed the provision. Second, the Respondent neglects to mention that Section 16.3 was modified and that the parties effectively returned to the pre-implemented practices.

Respondent applied Section 16.3's one-week advance notice requirement to Avery's participation in the unemployment hearing because it believed he was engaged in union activity and not "just in case" Avery claimed his participation was union business. And as the ALJ found, the Respondent's overbroad application of the notice requirement to protected activity not covered under Section 16.3 violated the Act. The Respondent's actions in discharging Avery for participating in a telephonic unemployment hearing fit the pattern of its hostility towards Avery's union activities and thus, any conduct that it believed constituted union representation or union business triggered an immediate and disproportionate response that disregarded wide spread and common work practices at the Respondent's facilities.

(4) The Respondent did not prove be a preponderance of the evidence that it would have taken the same action even if Avery had not engaged in Union Activity. The ALJ correctly concluded that Respondent did not meets this burden.

Respondent argues that it satisfied its *Wright Line* defense by showing it would have taken the same action absent Avery's protected activity. This argument is tied to the ALJ's findings of pretext and these findings depend largely on the ALJ's credibility determinations. The ALJ correctly discredited the reason Respondent used to terminate Mr. Avery because (1) it had never terminated anyone for falsifying a company record, let alone accuse employees who took too long of a break or stayed on their cell phones too long of falsifying a time record; (2) the Respondent treated employees charged with worse misconduct (i.e. a fraudulent record keeping scheme involving multiple false entries on company records) more favorably; (3) Respondent ignored Avery's long tenure and clean record; a record only marred in 2018 because of the Respondent's decision to restrict and hamper Avery's union activities; and (4) the Respondent gave another employee second "last chance" after being accused of falsifying a company record. (ALJD p. 29)

Moreover, the ALJ, citing *Ryder Truck Rental v. NLRB*, 401 F. 3d 815, 826-827 (7th Cir.

2005) *enfg.* 341 NLRB 761 (2004), concluded that Respondent used Avery's participation in the telephonic unemployment hearing as an "excuse" and not an actual reason for terminating his employment. (ALJD p. 31)

The Respondent's claim that it would have still disciplined Avery even if the phone call had related to non-union activities is not established by a preponderance of the evidence. The Respondent's termination letter makes clear that it disciplined Avery because it believed he was wearing his union representative hat when he participated in the unemployment hearing call and NOT as a witness. The clear implication is that had Avery established that he was participating on the call as a witness and not as a representative, the Respondent would not have disciplined him.

Additionally, this argument ignores the mountain of evidence that employees frequently use their cell phones to conduct non-union personal business during work time without being accused of stealing time or falsifying a time record. Indeed, a temporary employee had "multiple offenses" of using his phone for non-work related matters during work time before he was returned. Yet an employee with 27 years of service gets accused and terminated for participating in another former employee's unemployment compensation hearing on one and only one occasion. On this record, the Respondent clearly fell short of producing a preponderance of evidence to persuade the ALJ that it would have taken the same action absent Avery's union activities and position with the Union.

(5) The ALJ Correctly Held That Respondent's Asserted Reasons for the Termination Were Pretextual. (Response to Respondent Exceptions #6, 7, 8, 9, 35, 36, 37, 38, 40, 41, 42, 43, 44, 54, 55, 67, 74, 84, 88, 90, 91)

Respondent misapprehends Board law on pretext. Again, Respondent appears to believe that the mere assertion of a claim that Avery violated a work rule meets its burden to rebut the General Counsel's *prima facie* case. Resp. Br. at 40; This is not so. Where the reason asserted is pretextual, that rebuttal fails. A finding that the asserted reason is merely a pretext for an unlawful

motivation "necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Roemer Indus., Inc.*, 367 NLRB No. 133 (May 23, 2019); *Limestone Apparel Corp*., 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Respondent demonstrates a fundamental misunderstanding of *Wright Line* in arguing that the ALJ "prematurely ended her analysis" in finding its justifications pretextual. The ALJ concluded the analysis because, having found that the General Counsel made out a *prima facie* case that the Employer's acts were taken because of anti-union motivation, and that the Employer had nothing but pretext to offer in response, the case no longer presented a dual motive problem. "If the employer's proffered justification for the decision is determined to be pretextual, the Board is not obligated to consider whether the employer would have taken the same decision regardless of the employee's union activity." *Airgas USA, LLC v. NLRB,* 916 F.3d 555, 561 (6th Cir. 2019) (citation omitted). *See also La Gloria Oil & Gas Co*., 337 NLRB 1120, 1124 (2002) (distinguishing between a "pretextual" and a "dual motive" case).

The overwhelming weight of direct and circumstantial evidence demonstrated that the Employer was simply not believable in its assertions, and that its stated reasons for the termination were pretextual. As reviewed above, several of the factors that demonstrate anti-union animus also demonstrate pretext. Respondent's proffered justifications for Avery's termination have shifted and continue to shift, suggesting a search for a pretext to conceal the targeting of protected activity by a union activist. *See Kingman Regional Medical Center*, 363 NLRB No. 145 (2015). The Employer's consistently lenient treatment of other employees accused of violations like those Avery is alleged to have committed—falsification of records--supports a finding that it had other, unlawful motivations for disciplining Avery. See *La Gloria Oil & Gas Co*., 337 NLRB 1120, 1124

(2002) (where discriminatee drivers were disciplined for driving violations, employer showed leniency with other similarly situated drivers, and took disciplinary action in only one instance, and then in a lesser degree).

A finding of pretext is also appropriate because the weight of the evidence showed that the Employer simply did not maintain or enforce any policy prohibiting any aspect of Avery's conduct.[10] *Roemer Indus., Inc.*, 367 NLRB No. 133 (May 23, 2019) (justifications are pretextual where "the reasons advanced by the employer either did not exist or were not in fact relied upon"). The ALJ did not credit Respondent's claims, as articulated in its brief, that "If [Avery's] phone call had related to non-union activities —for example, a discussion with a friend about football or politics, or even a discussion about an issue at home —he still would have been terminated." Resp. Br. at 43. To the contrary, the ALJ found that the Employer did not have a policy against cell phone use on the job. ALJD at 29. The Employer failed to show that its practice is to treat continuing a phone call after break time and into work time as "overstaying a break." There are no other examples where the Employer took such an approach. The Employer failed to show that it treats overstaying a break as "falsification of records" or as "stealing time." Again, there are no other examples where the Employer took such an approach. The ALJ therefore found Lhoist's representations about the reasons it terminated Avery not to be creditable.

The Board must further reject Lhoist's attempt to fit this case under the Board's *Electrolux* decision. Lhoist again misconstrues the *Wright Line* burden-shifting framework. The Board in *Electrolux* held that a "discriminatory motive may be inferred [from pretext] but such an inference is not compelled." *Electrolux Home Products, Inc.*, 368 NLRB No. 34, slip op. (2019). *Electrolux*

[10] While arguably Avery's conduct could be prohibited under Lhoist's unilaterally implemented terms of employment, specifically Section 16.3 of these rules, Lhoist now claims that this rule was always unenforceable and did not factor into Avery's discipline. Resp. Br. at 15, 31, 39.

is limited to clarifying the evidence that may be used to support a finding of anti-union animus, part of the General Counsel's *prima facie* case. The Board explained that while it will continue to infer animus from the pretextual nature of an employer's proffered justifications for the adverse action, "at least where…the surrounding facts tend to reinforce that inference," pretext alone may not suffice to show animus at the *prima facie* case stage. *Electrolux* is not a defense where, as here, direct and circumstantial evidence--including, *contra Electrolux*, an ongoing dispute over bargaining and implementation--plainly demonstrates the presence of anti-union animus. Respondent improperly attempts to rely on *Electrolux* to argue that a finding that its asserted justifications are pretextual is insufficient as a matter of law to make out a violation.

E. The ALJ Correctly Found that Respondent Applied Its "Union Activity" Rule to Avery's Conduct in Violation of Section 8(a)(1). (Response to Respondent Exception #49, 76, 77, 78)

It is undisputed that Respondent maintained the following rule, Section 16.3 of its Unilaterally Implemented Terms and Conditions of Employment, at the time of Avery's suspension and discharge, and that the rule applied only to leave for union activities:

> Employees attending union conventions or meetings, third step grievance meeting(s), arbitration hearing(s) and labor negotiations will be allowed unpaid leave of absence at the Company's discretion and within the limitations of its operating needs and requirements without pay provided that no more than five (5) total employees are absent at the time and the request for leave shall be in writing by either an international or local Union officer provided one (1) week's notice is given to the Company in advance of leave. The Union will be responsible for paying these employees their wages for this union leave of absence.

In *Boeing Co.*, 365 NLRB No. 154 (2017), the Board held that rules that "expressly restrict" Section 7 activity are facially unlawful. The above rule, which on its face restricts Section 7 activity, was relied upon by the Employer in disciplining Avery. The ALJ correctly found that the

application of the rule to Avery's attendance of the telephonic hearing additionally violated the Act.

F. The Board Must Dismiss Respondent's Allegations of Judicial Bias and Affirm the ALJ's Credibility Findings. (Response to Respondent Exceptions #2, 4, 5, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 25, 26, 27, 28, 29, 45, 48)

Lhoist's claims that Judge Steckler's decision exhibits "bias" either against the Employer or for the General Counsel or Charging Party are utterly without basis. In *Silvercrest Industries*, the Board stated, "It is fundamental that a claim of bias, cannot be predicated on adverse credibility rulings." 220 N.L.R.B. 135, n2 (1975). And yet, Respondent asks this Board to do exactly that. The Board should reject this claim and affirm the judge's findings. *See, e.g., Sysco Food Services, LLC*, 343 N.L.R.B. 1183 (2004) (affirming an ALJ's credibility findings and rejecting the employer's allegations of judicial bias); *Meisner Electric, Inc.*, 316 N.L.R.B. 597 (1995) (aff'd 83 F.3d 437 (table) (11th Cir. 1996).

In assessing a claim of judicial bias, the Board should apply the doctrine articulated by the Supreme Court of the United States in *Liteky v. United States*, 510 U.S. 540 (1994). Under *Liteky*, the Court will dismiss any claim of judicial bias based on a judge's actions and decisions within the courtroom without external evidence, barring extreme cases of prejudicial behavior. See also *United Nurses Association of California v. NLRB*, 871 F.3d 767, 777–78 (9th Cir. 2017) (applying *Liteky* and rejecting an employer's claim of anti-employer bias by an Administrative Law Judge). Respondent's bias allegation is premised entirely on judge's credibility and evidentiary determinations, and includes no additional facts showing any undue influence on Judge Steckler's decision making. Therefore, it must be dismissed.

Moreover, the ALJ's credibility findings are well-supported and based on standard factors including "the context of the witness testimony, the weight of the respective evidence, established

or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole." *See* ALJD at 2; *Double D Construction Group*, 339 NLRB 303, 303–305 (2003). Still, the Respondent has excepted to every credibility finding made by the judge.

"The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Erickson Trucking Serv*., 366 NLRB No. 171 n2 (Aug. 27, 2018) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)). Respondent attempts to skew the traditional standard of review in its brief to the Board, and vastly understates the deference due an ALJ's credibility findings. The Board applies a "clear preponderance" standard to such determinations. The weight of Board law contradicts Respondent's assertion that only credibility decisions "based on demeanor" are accorded deference. Resp. Br. at 17.

In assessing Respondent's exceptions, the Board should apply the standard articulated in *Erickson Trucking* and refuse to overturn credibility resolutions unless a "clear preponderance" of the evidence requires it. ALJ Steckler made careful, individualized determinations of credibility, weighing the Board's traditional factors. In evaluating witness credibility, it is appropriate for an ALJ to consider demeanor, weight of evidence, established or admitted facts, inherent probabilities, and reasonable inferences. *El Rancho Market*, 235 N.L.R.B. 468 (1978). Respondent has failed to establish that a "clear preponderance" of the evidence should lead the Board to overturn the judge's credibility resolutions, and these exceptions should be dismissed.

Respondent takes great issue with the ALJ's decision to discredit the testimony of the employer witnesses at the hearing unless that testimony is an admission against interest or corroborated by other evidence. ALJD at 29. Lhoist is greatly aggrieved by this determination, even claiming that Lhoist is the victim of "bias" and that the ALJ as violated the APA.

Respondent's Brief at 44. However, either intentionally or as a result of misapprehension, Lhoist entirely ignores the reasoning behind ALJ Steckler's conclusion. Respondent's Brief incorrectly characterizes the judge's credibility determinations as "blanket." To the contrary, the ALJ made individualized determinations of credibility. She summed up her findings regarding the Respondent's witnesses "generally," because similar credibility issues plagued Respondent's witness testimony. In particular, the ALJ noted that the testimony of Respondent's witnesses was largely elicited through leading questions. Because Respondent's counsel chose to lead all of the Employer witnesses, all of their testimony received similar treatment. *See Richfield Hospital, Inc*., 368 NLRB No. 44, fn. 16 (August 23, 2019) (testimony not credible where leading questions asked by counsel on direct examination coach witnesses to give specific answers). The ALJ additionally discredited testimony by Employer witnesses where such testimony was inconsistent with credible evidence, internally inconsistent, or extremely vague, and explained these determinations. *See Unite Here! Local* 5, 365 NLRB No. 169 (2017) (witness's lack of credibility established through inconsistent statements); *Wonder State Mfg. Co.*, 141 NLRB 1217, 1228 (1963) (discrepancies in respondent witness's testimony, combined with lack of explanation or rebuttal provided by respondent, are a significant factors for discrediting a witness).

Where the ALJ credited witnesses for the General Counsel Avery and Wilson, she cited her reasoning for doing so. It is proper and entirely consistent with Board precedent to find testimony of current employees of a charged employer particularly reliable. *See, e.g., Gold Standard Enterprises, Inc*., 234 NLRB 618, 619 (1978) ("Every reason exists for finding the testimony of these employees particularly credible since both were still in Respondent's employ at the time of the hearing…"); *Shop-Rite Supermarket,* 231 NLRB 500, 505 n. 22 (1977) (testimony of current employees is often "given at considerable risk of economic reprisal,

including loss of employment … and for this reason not likely to be false."). The testimony of employees testifying against their supervisor or employer is afforded greater weight because of the likelihood that they are acting against their own pecuniary interests. *Flexsteel Industries*, 316 N.L.R.B. 745 (1995), enf'd 83 F.3d 419 (5th Cir. 1996); *Gold Standard Enterprises*, 234 N.L.R.B. 618 (1978); *Georgia Rug Mill*, 131 N.L.R.B. 1304 (1961). Such testimony should be treated as "particularly reliable." *Jewish Home for the Elderly*, 343 N.L.R.B. 1069, footnote 2 (2004) (affirming ALJ's credibility determination), and "current employee status may serve as a "significant factor," among others, on which reliance can be placed in resolving credibility issues." *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014).

VI. CONCLUSION.

For the above stated reasons, the Charging Party respectfully requests that the Board fully adopt the ALJ's recommended findings of fact and conclusion of law and order the Respondent to comply with the ALJ's recommended remedy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Answering Brief of the Charging Party USW by electronic transmission on this date to:

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